

DISCLAIMER

This electronic version of an SCC order is for informational purposes only and is not an official document of the Commission. An official copy may be obtained from the [Clerk of the Commission, Document Control Center](#).

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 7, 2002

APPLICATION OF

CPV CUNNINGHAM CREEK LLC

CASE NO. PUE-2001-00477

For approval of a certificate
of public convenience and necessity
pursuant to Va. Code § 56-265.2, for
an exemption from Chapter 10 of Title 56,
and for the interim authority to make
financial expenditures

FINAL ORDER

On August 31, 2001, CPV Cunningham Creek LLC ("CPV") filed an application with supporting testimony and exhibits requesting that the State Corporation Commission ("Commission") grant CPV a certificate of public convenience and necessity ("CPCN" or "certificate") pursuant to § 56-265.2 of the Code of Virginia (the "Code") for a new electric generating facility (the "Facility") to be located in Fluvanna County, Virginia (the "County"). CPV proposes to construct, own, and operate the combined-cycle natural gas-fired Facility, which would consist of two combustion turbines, two supplemental-fired heat recovery steam generators, and a steam turbine. The Facility would have a nominal capacity rating of 520 MW and would be capable of operating year-round as a base load generator. In addition, CPV sought an exemption from the provisions of Chapter 10 of Title 56 and interim approval to make financial expenditures and undertake preliminary construction, pursuant to § 56-234.3 of the Code.

On September 25, 2001, the Commission entered an order docketing this proceeding, requiring CPV to provide public notice of its application, establishing a procedural schedule, appointing a Hearing Examiner, and scheduling an evidentiary hearing for January 9, 2002 ("Initial Hearing"). On October 3, 2001, Columbia Gas of Virginia, Inc. ("Columbia"), filed a Notice of Participation.

The initial hearing was convened as scheduled on January 9, 2002. James R. Barrett, George D. Cannon, Jr. and Cassandra Sturkie, Esquires, appeared on behalf of CPV. Allison L. Held, Esquire, and William H. Chambliss, Esquire, appeared as counsel for the Commission's Staff. M. Renae Carter, Esquire, appeared as counsel for Columbia. Columbia presented a Stipulation dated January 7, 2001, to which CPV, the Staff, and Columbia had agreed.¹ They stipulated that the prefiled testimony and evidence would be entered into the record without subjecting the witnesses to cross-examination. CPV presented the prefiled testimony of Chris Broemmelsiek, CPV's vice president for project development; and Glenn Harkness, senior vice president for TRC Environmental Corporation ("TRC") and principal-in-charge on the environmental and technical features of the Facility. The Commission Staff presented the prefiled testimony of three witnesses: Gregory L. Abbott, utilities analyst in the Division of Energy Regulation; Mary E. Owens, principal financial analyst in the Division of Economics and Finance; and Mark Carsley, principal research analyst in the Division of Economics and Finance. All prefiled testimony was offered into evidence without causing the witnesses to take the witness stand.

¹ The Stipulation recognizes that CPV will construct and own a natural gas lateral from the Transcontinental Gas Pipe Line Corporation's natural gas transmission line located on the site of the proposed Facility, and that the natural gas lateral will be used solely to provide natural gas to the Facility.

Prior to the Initial Hearing, Daniel R. Holmes of the Piedmont Environmental Council and several members of the public wrote to express opposition to the proposed Facility; other members of the public and elected officials in Fluvanna County wrote to express support for the Facility. Both in the written comments and in the oral testimony, the public witnesses raised specific concerns on the following issues: the proximity of the proposed Facility to residential neighborhoods and land use, construction traffic, noise pollution, the cumulative air emissions from existing and proposed generating plants in Fluvanna County and surrounding areas, and the possible need for additional ozone monitoring stations in the area, to be purchased and installed by CPV. Other witnesses raised concerns about the Facility's potential impact on the water supply and wastewater system serving the Lake Monticello community. Two witnesses expressed concern about a possible evacuation from the Lake Monticello gated community in the event of an emergency at the Facility.

On February 22, 2002, the Hearing Examiner issued a ruling directing the record in this case to be reopened to receive additional supplemental testimony on the limited issues raised by the public witnesses. The ruling established a schedule and a hearing date of April 23, 2002, to receive evidence on the identified issues, and also invited the Department of Environmental Quality ("DEQ") to file any additional comments or testimony on the areas within its expertise.

After the Initial Hearing, John M. Daniel, Jr., Director of Air Program Coordination for the DEQ, submitted two letters to the Commission commenting on CPV's proposed Facility. The first letter, dated April 15, 2002, stated that CPV's proposed project was one of the best that the DEQ has seen, and will be cleaner than most combined cycle turbine facilities. Further, Mr. Daniel stated that CPV was below the numerical "significant impact level" for all pollutants that the Environmental Protection Agency defines for the PSD permit program. The second

letter, dated April 22, 2002, stated that the DEQ had reviewed the cumulative impacts analysis undertaken by TRC and found TRC's methodology to be a reasonable approach. Mr. Daniel determined that TRC's analysis demonstrates that CPV's project, alone or in combination with other proposed projects in Fluvanna County and the surrounding counties, will have a negligible impact on air quality. Finally, Mr. Daniel concluded by stating that CPV and the DEQ have adequately addressed the issue of cumulative air quality impacts with respect to CPV's project.

On April 23-24, 2002, the Hearing Examiner convened a second hearing ("Second Hearing") to receive additional evidence on the limited issues that were raised at the Initial Hearing. Twenty-eight public witnesses, including officials of Fluvanna County and members of the public, offered testimony. Eight witnesses spoke in favor of CPV's proposed Facility and 19 witnesses spoke in opposition to it. CPV introduced prefiled supplemental testimony and presented four witnesses for examination: Shelly H. Wright, Fluvanna County Deputy Coordinator for Emergency Services; Chris Broemmelsiek; Frederick M. Sellars, Vice President and National Director of Energy Facilities Permitting for TRC; and Harry Vidas, Vice President of Energy and Environmental Analysis, Inc. Commission Staff also submitted the prefiled supplemental testimony of Gregory L. Abbott.

On May 17, 2002, the Hearing Examiner issued a ruling granting CPV's motion, filed on May 6, 2002, to reopen the record for the limited purpose of submitting additional prepared testimony by Mr. Broemmelsiek on the issue of CPV's intent to construct and operate the Facility.² In his additional supplemental testimony, Mr. Broemmelsiek asserted that CPV

² CPV stated in its motion that, subsequent to the Second Hearing, the Commission issued an order in Case No. PUE-2001-00430 remanding the CPCN application of Mirant Danville, LLC ("Mirant") to the hearing examiner for further proceedings because, among other things, Mirant had signaled its intent to defer the construction of its proposed facility indefinitely while it negotiated with other entities to take over the development of the project. CPV stated that because several public witnesses argued that CPV does not intend to construct and operate the Facility, good cause existed to reopen the record on the limited issue of CPV's intent to construct and operate the Facility.

intends to develop, own, and operate the Facility, and that any confusion as to this point may relate to the various financing options that CPV Inc. has with respect to the Facility. In his additional prepared testimony, Mr. Broemmelsiek explained the various financing options available to CPV for its Facility.

On August 7, 2002, Chief Hearing Examiner Deborah V. Ellenberg issued a Report in which the Examiner summarized the record, and reviewed and analyzed the evidence and issues in this proceeding. The Examiner's Report included the following findings:

- (1) The project will have no adverse impact on the reliability of the Dominion Virginia Power electric system;
- (2) The current level of air quality in Fluvanna County is good, and is in attainment of all National Ambient Air Quality Standards ("NAAQS");
- (3) The Applicant's cumulative impact analysis is reasonable;
- (4) The cumulative impact analysis adequately demonstrates that the emissions, when combined with the emissions from other existing or proposed facilities, will have no material adverse effect on air quality in Fluvanna County and the surrounding area;
- (5) The analyses discussed by the Applicant also demonstrate that the project will have no significant effect on ground level ozone in Fluvanna County and the surrounding area;
- (6) The emissions will have no material effect on economic development in Fluvanna County and the surrounding counties because the analyses show no significant deterioration of air quality and maintenance of levels well below the NAAQS;
- (7) The project will positively affect the local and regional economy;
- (8) The Facility will have no adverse effect on competition and could enhance competition at the wholesale level; however, CPV should be required to report any changes in its

business plan, particularly as they relate to changes in equity ownership interests, to the Division of Economics and Finance so that the Commission can stay informed of market changes; and

(9) The Facility will have no adverse impact on the public interest.

The Examiner recommended that the Commission grant CPV authority and a certificate of public convenience and necessity pursuant to § 56-580 D of the Code of Virginia to construct and operate an electric generation facility, and its associated facilities in Fluvanna County as described above and based upon the record developed herein. The Examiner also recommended that the Commission direct CPV to comply with the recommendations of the DEQ; report any changes in its business plan, including changes in equity ownership; provide that the certificate will sunset if construction has not begun within two years from the date of a Commission final order granting approval of the CPV Cunningham Creek project; provide that the certificate is conditioned on the receipt of all permits necessary to operate the Facility, and direct the Applicant to provide a complete list of such permits to the Division of Energy Regulation; and dismiss this case from the docket of active matters.

On August 12, 2002, CPV filed a letter stating that it had no comments on the Hearing Examiner's Report, and waiving the 21-day comment period.

On September 18, 2002, CPV filed its permit to construct and operate an electric power generating facility in Fluvanna County in accordance with the provisions of the Virginia State Air Pollution Control Board's Regulations for the Control and Abatement of Air Pollution.

NOW THE COMMISSION, having considered the record, the pleadings, the Examiner's Report, and the applicable law, is of the opinion and finds that the certificate should be issued. As set forth in prior orders,³ the Code of Virginia establishes six general criteria, or areas of

³ See, e.g., *Application of Tenaska Virginia Partners, LP, For approval of a certificate of public convenience and necessity pursuant to Virginia Code §56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to*

analysis, that apply to electric generating plant applications. The six criteria are as follows:

(1) reliability;⁴ (2) competition;⁵ (3) rates;⁶ (4) environment;⁷ (5) economic development;⁸ and (6) public interest.⁹ We have evaluated these six areas.

Pursuant to § 56-580 D of the Code of Virginia, we find that the proposed facilities:

(i) will have no material adverse effect upon reliability of electric service provided by any regulated public utility; and (ii) are not otherwise contrary to the public interest. We have evaluated the application pursuant to § 56-46.1 of the Code of Virginia and have given consideration to the effect of the proposed facilities on the environment. We note that, effective July 1, 2002, § 56-46.1 A provides, among other things, that permits regulating environmental impact and mitigation of adverse environmental impact shall be deemed to satisfy the requirements of such section with respect to all matters that are governed by the permit. CPV filed a copy of its permit issued by the DEQ to construct and operate an electric power generating facility in Fluvanna County in accordance with the provisions of the Commonwealth of Virginia State Air Pollution Control Board's Regulations for the Control and Abatement of Air

make financial commitments and undertake preliminary construction work, Case No. PUE-2001-00039, April 19, 2002, Final Order, and *Application of Old Dominion Electric Cooperative, For a certificate of public convenience and necessity for electric generation facilities in Louisa County*, Case No. PUE-2001-00303, July 17, 2002, Final Order.

⁴ Va. Code Ann. §§ 56-580 D(i) and 56-46.1 A.

⁵ Va. Code Ann. § 56-596 A.

⁶ Va. Code Ann. §§ 56-580 D(ii); 20 VAC 5-302-20 14. *See also Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities*, Case Nos. PUE-2001-00303 and PUE-2001-00665, Order Adopting Rules and Prescribing Additional Notice at 6 (Dec. 14, 2001).

⁷ Va. Code Ann. §§ 56-580 D and 56-46.1 A. This includes scenic assets and historic districts.

⁸ Va. Code Ann. §§ 56-46.1 and 56-596 A.

⁹ Va. Code Ann. §§ 56-580 D(ii).

Pollution. We grant CPV approval, and a certificate of public convenience and necessity, to construct and operate its proposed facilities.

Accordingly, IT IS ORDERED THAT:

(1) Pursuant to § 56-580 D of the Code of Virginia, CPV is hereby granted authority and a certificate of public convenience and necessity to construct and operate an electric generation facility, and its associated facilities in Fluvanna County, as described in this proceeding.

(2) The certificate of public convenience and necessity granted herein shall be conditioned on the receipt of all permits necessary to operate the Facility, and the complete list shall be provided to the Commission's Division of Energy Regulation.

(3) As a condition of the certificate granted in this case, CPV shall comply with all recommendations of the DEQ.

(4) As a condition of the certificate granted in this case, CPV shall report any changes in its business plan, including changes in equity ownership, to the Commission's Division of Economics and Finance.

(5) The certificate of public convenience and necessity granted herein shall expire two years from the date of this order, if construction of the Facility has not commenced.

(6) There being nothing further to come before the Commission in this proceeding, this case shall be removed from the docket and the papers transferred to the file for ended causes.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

MOORE, Commissioner, Concurs:

Given the statutory change effective July 1, 2002, I concur with my colleagues in the decision to approve construction and operation of the proposed facility. I do so because the Applicant has been issued a permit by the DEQ that governs certain emissions of the proposed facility. The permit is specific in addressing matters that would cause me to deny the application without further data and analyses.¹

¹ While under the new law I conclude that we must approve the proposed project, I continue to have the concerns expressed in my prior dissents and concurrence. See, e.g., Commissioner Moore concurrence, *Application of Old Dominion Electric Cooperative For a certificate of public convenience and necessity for electric generation facilities in Louisa County*, Case No. PUE-2001-00303, Final Order (July 17, 2002).

This case is little better than prior applications. In this proceeding, the Applicant responded to certain matters I raised in my dissent in *Tenaska* (Case No. PUE-2001-00039). Unfortunately, the response was less than satisfactory in certain areas. While Company witness Sellars appeared to acknowledge that pollution levels below the NAAQS can cause harm, he continued to assert that PSD “increments” are sufficient to avoid degradation of air quality. (Hearing Examiner Report at 43.) He failed, however, to note in his discussion of this issue that there is no PSD “increment” for ozone and that the ozone level for the area is already almost at the NAAQS.

In response to my concern about particulate matter, specifically PM_{2.5}, Mr. Sellars states that maximum annual concentration data available for Virginia indicate a range of between 12 and 15.1 mg/m³ as compared to the PM_{2.5} NAAQS of 15 mg/m³. Mr. Sellars states that Fluvanna County should be at the “lower end of the 12 to 15.1 mg/m³ spectrum . . .” (Hearing Examiner Report at 44-45.) There was no explanation by Mr. Sellars of why we should not be concerned when PM_{2.5} concentrations in the area in question are, by his estimate, already at least at 80% of the NAAQS. This is particularly alarming since there is no “safe” level of particulate matter.

With respect to the new eight-hour ozone standard, Mr. Sellars states that Fluvanna County is not listed as a locality recommended for ozone non-attainment designation by the DEQ. (Hearing Examiner Report at 45.) What Mr. Sellars failed to do is provide data with respect to the new standard. The Company’s failure to provide eight-hour ozone data means we do not know how close Fluvanna County is to the new, lower eight-hour standard. Under the less stringent one-hour standard, according to the Company, the ozone level in Fluvanna is already at more than 85% of the NAAQS. As noted in my dissent in *Buchanan*, exceedances under the eight-hour standard were more than 15 times greater (783 compared to 50) than under the one-hour standard for the 1996-2000 period. Commissioner Moore dissent at 3-4, *Application of Buchanan Generation LLC, For permission to construct and operate an electrical generating facility*, Case No. PUE-2001-00657, Final Order (June 25, 2002). It could be that Fluvanna County is just below the non-attainment level under the new standard. Again, this is alarming because there is no “safe” level of ozone.

While cumulative impact studies now exist and there appears to be acknowledgement that there are no safe levels of particulate matter and ozone, Virginia’s analyses and actions have not changed as a result. Virginia appears to continue to approve plants as long as it is not shown that the NAAQS will be exceeded in the near future. Meanwhile, reports continue to be published indicating that parts of Virginia suffer environmentally. See, e.g., *Code Red, America’s Five Most Polluted National Parks*, September, 2002.